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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

PETITION FOR REHEARING

Appeal From the Court of Criminal Appeals of the State of Texas

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COMES NOW, HERBERT TIGNER, Petitioner in the above entitled cause, and presents this, his petition for rehearing thereof, and in support of such petition respectfully shows:

I.

This is a criminal case. It was decided by this Court on May 6, 1940. Petitioner was indicted for a conspiracy to fix

the retail price of beer. Title 19, Chapter 3 of the TEXAS PENAL CODE, condemning such conspiracies, specified that the law should not "apply to agricultural products or livestock in the hands of the producer or raiser." (Art. 1642, TEXAS PENAL CODE OF 1925). Petitioner challenged the validity of the entire statute and sought relief in the local court by habeas corpus. His contention, that such an exemption, granted by the Texas statute, violated the "Equal Protection Clause" of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES, was upheld by the Supreme Court of the United States in the case of CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, wherein this Court held that an identical exemption in the same kind of statute, adopted by the State of Illinois, rendered such statute unconstitutional. The opinion of this Court, delivered by MR. JUSTICE FRANKFURTER, makes two important statements to which this Court's attention is directed as they form the basis for Petitioner's motion for rehearing, to wit:

(1) "The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in Connolly's case";

(2) "Connolly's case has been worn away by the erosion of time, and we are of the opinion that it is no longer controlling."

It is apparent to everyone that at the time Tigner committed the acts with which he was charged in the indictment, the law of the land, as announced by the Supreme Court of the United States in the CONNOLLY case, supra, and as declared by the Supreme Court of Texas in STATE v. SHIPPERS COMPRESS & WAREHOUSE COMPANY, 95 Tex. 603, 69 S.W. 58, was to the effect that this particular criminal statute,

containing the exemption above mentioned, was an invalid and unconstitutional Act, the violation of which would not subject a citizen to prosecution. This is undisputed.

Section 9 of Article I of the CONSTITUTION OF THE UNITED STATES declares "that no Bill of Attainder or Ex Post Facto Law shall be passed." Time and again this Court has announced in its opinions that it is the substance of the law which counts. The opinion of this Court, herein rendered, sanctions, as to this Petitioner, in substance and in effect, the passage of a Bill of Attainder or Ex Post Facto Law such as is prohibited by both the Constitutions of the United States and the State of Texas. (See Section 16, Art. I, of the CONSTITUTION OF THE STATE OF TEXAS.)

When was Appellant, Herbert Tigner, advised that "Connolly's case has been worn away by the erosion of time?" When was Appellant, Herbert Tigner, advised that the Supreme Court of the United States was "of the opinion that it (Connolly's case) was no longer controlling?" This information was imparted for the first time to him and to every other person in the United States by the decision of this Court on May 6, 1940. Prior to that time, as was pointed out by Appellant in his brief herein filed, the case of CONNOLLY v. UNION SEWER PIPE COMPANY, decided by the Supreme Court of the United States on March 10, 1902, had been cited one hundred forty-two (142) times in opinions rendered by the United States Appellate Courts; and in none of these opinions was there any intimation that the sound doctrine of constitutional law therein announced should be repudiated. For thirty-eight (38) years this decision had been a landmark in constitutional law. Tigner had a right to believe (because it was a fact) that it was still the law when on or about the 31st day of May, A. D. 1937, as alleged in the indictment (R. 1), he did those things set forth in the indictment which was filed on June 25, 1937. However persuasive the logician

may consider the pronouncements made in this Court's opinion on May 6, 1940, the fact remains that this Court has, in effect, sanctioned by this decision, a Bill of Attainder or Ex Post Facto Law contrary to the express provisions of both the Constitutions of the United States and the State of Texas. Under the CONNOLLY case, the Texas statute was invalid when it was adopted in 1911. When did it become valid? Clearly, not until this Court announced its decision on May 6, 1940. Certainly the rule of stare decisis should protect the rights of Petitioner as those rights existed on May 31, 1937. The Fourteenth Amendment to the Constitution, as interpreted at that time by the Supreme Court, was a shield for his conduct, and a withdrawal of that shield, under the circumstances of this case, appears to counsel to be a gross injustice.

When the Court of Appeals of Kentucky in the case of PAYNE v. CITY OF COVINGTON, 123 S.W. (2d) 1045 (decided December 16, 1938), felt impelled to overrule a previous decision of that Court, interpreting an important provision of the Constitution of the State of Kentucky, it said:

> "Therefore, in overruling our prior opinions and in declaring our disapproval of such erroneous interpretations herein dealt with, we do so with the express reservation that all rights heretofore created and accrued in favor of all persons interested, in any manner whatsoever, shall be preserved and the principles of this opinion will not apply to any transaction begun or in the course of completion, or finished before this opinion becomes final. * * * As a consequence of the conclusions we have reached the opinion in the cases of City of Providence v. Providence Electric Light Co., supra; Overall v. City of Madisonville, 125 Ky. 684, 102 S.W. 278, 31 Ky. Law Rep. 278, 12 L.R.A. (N.S.) 433; Carter v. Krueger & Son, 175 Ky. 399, 194 S.W. 553, and all others following the interpretations therein made are hereby ex-

pressly overruled; but with the reservation, supra, whereby the rights of all parties are preserved, and this opinion shall have a prospective effect only."

In that case, a just and fair Court concluded its opinion as follows:

> "However, the withholding of any retroactive effect of this opinion requires an affirmance of the judgment, since compliance is shown with the erroneous interpretations heretofore made. Wherefore, the judgment of the lower court is affirmed."

If this Court adheres to its decision with reference to the CONNOLLY case, it should do so in such a way as that the judgment of the Court shall not be retroactive. Any other course would work a grievous injustice upon Petitioner, as must be apparent to every member of this Honorable Court.

In the case of GREAT NORTHERN RAILWAY COMPANY v. SUNBURST OIL & REFINING COMPANY, 287 U.S. 358, 77 L. Ed. 360, the Supreme Court of the United States, in an opinion by MR. JUSTICE CARDOZA, reviewed a set of facts with respect to which the Supreme Court of the State of Montana pursued a similar course to that followed by the Kentucky Court of Appeals. In that case, JUSTICE CARDOZA said:

> "We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal Constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. * * * This is a case where a court has refused

to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. * * * The choice for any State may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

A like decision by the Supreme Court of Montana was made in the case of MONTANA HORSE PRODUCTS COMPANY v. GREAT NORTHERN RAILWAY COMPANY, 91 Montana 194, 7 Pac. (2d) 919. The principle for which Appellant argues in this motion for rehearing is also discussed in an article appearing in Volume 23, pages 32 and 33 of the AMERICAN JUDICATURE SOCIETY JOURNAL, Issue of June, 1939.

If the CONNOLLY case is overruled, as the Texas Court of Criminal Appeals has done, this Court should not permit

such a ruling to have a *retroactive effect* as such is a clear denial of due process of law as to Appellant, and sanctions what amounts to a retroactive or ex post facto law. There is no public necessity which justifies such a course of action, as Appellant's civil rights are of equal importance to the property rights protected by the decisions of the Kentucky and Montana Courts which have been approved, in effect, by this Court.

It seems to counsel for Petitioner that the time has come for this Court to determine whether or not the citizens of this country can rely upon the pronouncements of this Court as the established law of the land. Does the doctrine of stare decisis mean anything to this Court? Certainly it is a vital principle to litigants situated as is your Petitioner whose very liberty is jeopardized by reason of the fact that this Court has not recognized the rule of stare decisis as binding in this case. We can have no just quarrel with this Court in overruling long established and generally accepted principles of law if in overruling them the rights of litigants theretofore accrued are duly protected. Unless such is done the rights of our citizens, as fixed under the decisions of this Court, are subject to being blown away as leaves before the autumn winds. If this Court desires to overrule the CONNOLLY case and the principle of law therein announced because, as MR. JUSTICE FRANKFURTER colorfully states, it "has been worn away by the erosion of time," then such decision should preserve the rights of litigants which have accrued during the time when such a decision has been treated and considered as the law of this land. This decision was just as much a part of our law as any solemn act of the Legislature of Texas or Act of Congress. It was a clear pronouncement that the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES forbade a State Legislature from making arbitrary classifications. JUSTICE HARLAN, in this opinion, stated:

> "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

During the ensuing thirty-eight (38) years practically every Justice of the Supreme Court of the United Statets, including JUSTICE HOLMES, cited this decision with approval. The Texas statute under which Herbert Tigner was indicted was identical in substance and in form with the Statute of Illinois declared to be invalid by this decision. Tigner had the right to assume that the Texas Statute would receive a like construction, particularly when the decision of the Supreme Court of the United States had been fortified by like decisions of the highest court of the State of Texas. There was no way for him to know by reference to any pronouncement of this or any other court that the "processes of time" had eroded the principle of law announced in the CONNOLLY case. He had every right to believe, in the light of this decision and its oftime approval by this Court, that the statute of the State of Texas was a nullity. He is in no different situation from that which he would occupy if here had been no such statute of the State of Texas in existence during the year 1937, or any year prior thereto, and if the Legislature of the State of Texas in 1940 had passed a statute making criminal those acts which Herbert Tigner had performed in the year 1937. This Court would have promptly nullified such a statute. Such a law would have

clearly violated the letter and spirit of both State and Federal constitutions. Every member of this Honorable Court would have declared it a nullity because it would have clearly violated important constitutional prohibitions. Such being the case, counsel for Appellant respectfully submits, with all due deference, that this Court should not do indirectly that which the Constitution of the United States and the Constitution of the State of Texas declare cannot be done directly. It should not by the pronouncement of its decisions make laws retroactive; and this is exactly what this Court has done in this case unless it modifies its decision and prevents a retroactive effect, as was done by the highest Courts of Kentucky and Montana with the implied sanction and endorsement of the Supreme Court of the United States in the case of GREAT NORTHERN RAILWAY COMPANY v. SUNBURST OIL & REFINING COMPANY, supra.

Counsel for Petitioner realizes that whether or not this Court will adopt this course depends, as JUSTICE CARDOZA said, upon "the wisdom of this Court's philosophy." Petitioner stands before this Court as an humble litigant asking for the preservation of fundamental rights which are dear to every American citizen. The rights he claims are civil and personal rights protected by the Constitutions under which he lives. He can have no just cause for complaint if this Court would adopt the "wise philosophy," mentioned by JUSTICE CARDOZA, holding that the doctrine of the CONNOLLY case is overruled, and will not be applied to new situations as they arise under existing or future laws, but applying to Petitioner's case, the rule announced in the CONNOLLY case, as such was the law of the land during the year 1937 when this indictment was returned. If this Court overrules the CONNOLLY case and refuses to apply to the Texas statute the same yardstick of justice under the Constitution of the United States which it applied to the

Illinois Statute, then this Court has in effect sanctioned a retroactive or Ex Post Facto Law and become a party to the doing of that which our State and Federal Constitutions declare shall not be done. The interpretations of the Constitution of the United States by this Court, until expressly overruled, should be safe guides for every citizen to follow in his personal and business conduct. Unless this is true, no citizen can pursue his business with any assurance in the orderly processes of the law.

II.

This legislative exemption, granted to farmers and stockmen, cannot be justified on the grounds that "Texas may promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture." This is the fundamental position taken by the court in the opinion written by MR. JUSTICE FRANKFURTER. We would have no quarrel if the State of Texas, in fact, were undertaking by its law to promote a policy of economic freedom for its agricultural and livestock industries. Such is not the case. We but play with words when this statement is made in the face of the unchallenged facts presented by this record. The record reflects that the State of Texas by its law has made illegal ALL price fixing agreements,—not alone the price-fixing agreements of its citizens, who are engaged in the oil business or in the manufacturing business, but the price-fixing agreements of its farmers and ranchmen. *The State of Texas has not undertaken by its laws to promote the business of farming or ranching by exempting these businesses from the condemnation of price-fixing statutes.* On the contrary, the policy of the State of Texas, as exemplified by the valid acts of its Legislature,

upheld by the Supreme Court of the State of Texas (STATE v. STANDARD OIL COMPANY, ET AL., 107 S.W. (2d) 550), has made all price-fixing agreements illegal. However, the State of Texas has attempted by law to grant an exemption from criminal prosecution to farmers and stockmen. It has made a class selection for legislative purposes which has no reasonable relation to the object and purpose of the law. Under all of the decisions of this Court, until the day when MR. JUSTICE FRANKFURTER announced that "the processes of time had eroded the doctrine of the Connolly case," it was the settled law that arbitrary classifications—those which discriminated against some and favored others,—were illegal, under the "equal protection clause" of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES. This Amendment (said the prior cases) "requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." HAYES v. MISSOURI, 120 U.S. 68, 71. Under the Texas law, all citizens are *similarly situated* in that *they are prohibited* from making *price-fixing agreements*, but upon farmers and stockmen the law confers a *special favor*,—for no logical reason or purpose whatsoever,—in that this *particular class*, though similarly circumstanced with respect to the law, is exempt from criminal punishment. No more glaring example of special favor or dispensation can be imagined!

This Court but sets up a straw man for the purpose of demolishing it when it declares that the Legislature *has a right* to promote the the economic freedom of its agricultural and livestock industries. The Legislature *may have the right to do this*, but it has not attempted to exercise the right. We would not quarrel with a decision of this Court which declared this right where the State by its statutes *had sought*

to accomplish this objective. We do protest, however, against unwarranted and unjustified classifications, based upon occupation alone, under criminal laws, where one group of citizens can be sent to the penitentiary for doing an illegal act while another group of citizens doing the same illegal act is not subjected to the same penalty. This is certainly a denial of the Equal Protection Clause as guaranteed by the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES because it is a denial of equal laws where no factual situation exists which justifies this disparity and injustice.

This Court's decision goes vastly beyond the CONNOLLY case. There, it might be said, the Legislature had in mind the purpose mentioned by MR. JUSTICE FRANKFURTER. Here, it is clear that the Legislature of Texas had no such purpose. A law which made it illegal to pursue certain political activities but exempt from prosecution all Democrats would be on a parity with this statute which this Court declares to be nondiscriminatory. Only a lullaby of words can harmonize this situation with the purpose and spirit of the Equal Protection Clause of the Fourteenth Amendment,—the true facts call for a condemnation of this law as a flagrant attempt to make "sauce for the goose a deadly poison for the gander."

JUSTICE FIELD, speaking for the Court in BARBIER v. CONNALLY, 113 U.S. 31, condemned this law when he said:

> "The Fourteenth Amendment * * * undoubtedly intended * * * that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

This pronouncement is clear. It is logical. It appeals to one's sense of justice and right. It represents the true spirit

in which the principle of equal protection of the law was written into the Constitution of the United States,—a principle for which many patriots gave their lives.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this motion for rehearing be granted; affirming that this petition is presented in good faith and not for delay.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 635.—October Term, 1939.

Herbert Tigner, Appellant,
vs.
The State of Texas.

Appeal from the Court of Criminal Appeals of Texas.

[May 6, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal under § 237(a) of the Judicial Code, as amended, 28 U. S. C. § 344, to review a judgment of the Court of Criminal Appeals of Texas sustaining the constitutionality of a Texas anti-trust law, and therefore upholding an indictment under it. Appellant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy is made a criminal offense by Title 19, Chapter 3, of the Texas Penal Code. Because the provisions of this law do not "apply to agricultural products or live stock in the hands of the producer or raiser", Art. 1642, Tigner challenged the validity of the entire statute and sought release in the local courts by *habeas corpus*. His claim has been rejected by the Texas Court of Criminal Appeals. 132 S. W. (2d) 885. Essentially his contention is that the exemption granted by the Texas statute falls within the condemnation of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, as offensive to "the equal protection of the laws" which the Fourteenth Amendment safeguards. If that case controls, appellant contends, the Texas Act cannot survive and he must go free.

The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in *Connolly's* case. But it felt that time and circumstances had drained that case of vitality, leaving it free to treat the exemption as an exercise of legislative discretion. A similar attitude has been reflected by the ~~Wisconsin Supreme Court~~ Supreme Court of Wisconsin, *Northern Wis. Cooperative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 593, and appears to underlie much recent state and federal legislation. Dealing as we are with an appeal to

the Constitution, the *Connolly* case ought not to foreclose us from considering this exemption in its own setting.

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups.[1] These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.[2]

Since *Connolly's* case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws;

[1] See 2 Beard, The Rise of American Civilization, pp. 254-343; Buck, The Granger Movement, *passim;* Hicks, The Populist Revolt, *passim;* Sheldon, Populism in the Old Dominion, pp. 17-20. Compare the letter of Mr. Justice Miller in Fairman, Mr. Justice Miller and the Supreme Court, p. 67. For the background of the Texas legislation see Finty, Anti-Trust Legislation in Texas, a collection of articles published in the Galveston News during the summer of 1916; Nutting, The Texas Anti-Trust Law: A Post-Mortem, 14 Tex. L. Rev. 293.

[2] See Seager and Gulick, Trust and Corporation Problems, pp. 149-95, 339-85.

have relieved their organizations from taxation. See, e. g., Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291; Clayton Act, 38 Stat. 730, 731, 15 U. S. C. § 17; § 101(a) of the Internal Revenue Code, 53 Stat. 33. Such expressions of legislative policy have withstood challenge in the courts. *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71.[3] Congress and the states have sometimes thought it necessary to control the supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Nebbia* v. *New York*, 291 U. S. 502.

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws.[4] These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws", and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* case has been

[3] The state court cases are collected in United States *v.* Rock Royal Coop., 307 U. S. 533, 563-64. See Hanna, Law of Cooperative Marketing Associations, pp. 26-111. Compare German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389, 418; International Harvester Co. *v.* Missouri, 234 U. S. 199; Aero Transit Co. *v.* Georgia Comm'n, 295 U. S. 285.

[4] See, for instance, the findings and declarations of policy embodied in the Agricultural Adjustment Act of 1938, 52 Stat. 31. Compare Seager and Gulick, *op. cit. supra*, note 2, pp. 322-23; Black, Agricultural Reform in the United States, pp. 1-61, 337-49; Nourse, Davis and Black, Three Years of the Agricultural Adjustment Administration, *passim*; Nourse, Marketing Agreements Under the A.A.A., pp. 315-49. Compare, as to railroad and express consolidations, § 5(8) of the Interstate Commerce Act as amended, 41 Stat. 456, 482, 49 U. S. C. § 5(8); as to bituminous coal, see § 4, I (d) of the Bituminous Coal Conservation Act of 1937, 50 Stat. 72, 77.

worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly; the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. Title 126, Revised Civil Statutes. From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors.[5] In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, and, in the case of shipping combinations, by the Merchant Marine Act,

[5] See the Sherman Law, as amended, and supplementary enactments, in 15 U. S. C. §§ 1, 2, 4, 6, 9, 11, 15, 16, 21, 23, 25, 26.

U. S. Nav. Co. v. *Cunard S.S. Co.*, 284 U. S. 474. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies.[6] When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained the validity of the statute. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401.

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

Affirmed.

Mr. Justice McREYNOLDS is of opinion that the judgment below should be reversed.

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[6] See Nutting, *op. cit. supra*, note 1, pp. 296-97. For the remedies now prevailing, see Texas Penal Code, Art. 1635, 1637, 1638; Revised Civil Statutes, Art. 7428-7437.